

STRICT LIABILITY RISKS WHEN DESIGNING DANGEROUS PRODUCTS

In October of last year the Wisconsin Court of Appeals was asked to review a Milwaukee County circuit court decision dismissing a defective design claim. The claim was brought by Rubin Baez Godoy in the case entitled Godoy v. E.I. DuPont De Nemours and Co., asserting defective design claims in both strict liability and negligence against the manufacturers of white-lead-carbonate pigment. The case was decided on the issue of whether Godoy's complaint sufficiently alleged that the lead-carbonate pigment was defectively designed. The circuit court of Milwaukee County ruled that it did not. The Court of Appeals agreed.

Godoy alleged that he suffered "lead poisoning by ingesting white lead carbonate derived from intact accessible painted surfaces, paint chips, paint flakes and dust" in an apartment rented by his family. Paint manufacturers and manufactures of the white-lead-carbonate were sued by Godoy, but the paint manufacturers were the subject of different lawsuit, Thomas ex rel. Gramling v. Mallett, which held that a plaintiff alleging lead-based paint injury need not specify the responsible manufacturer.

Godoy did not allege that the defendants helped the paint manufacturers formulate the white lead-based paint but Godoy asserted that the manufacturers intended that the white-lead-carbonate be used in paint. Godoy asserted that the manufacturers of the carbonate knew that it was dangerous when used in paint but lied about it.

The Milwaukee circuit court ruled that "lead is an inherent characteristic of white lead carbonate" and that it could not be designed without using lead. In response to Godoy's contention that a white paint pigment could have been made using zinc instead of lead, the circuit court observed that a "design decision" to use zinc would result in "white-zinc carbonate", not white-lead carbonate.

The issue before both the circuit court and the Court of Appeals was whether a product

can be said to be defectively designed when that design is inherent in the nature of the product so that an alternative design would make the product something else.

Wisconsin case law allows plaintiffs to seek recovery from a manufacturer for the defective design of a product both under a strict liability theory and a negligence theory.

The Court of Appeals noted that in order for a defective design to render a product unreasonably dangerous, the defect must be hidden from the ordinary consumer and not an open and obvious defect in the product. The Court of Appeals went on to observe that the converse is not true: “Something that is an ‘open and obvious’ danger does not necessarily mean that the danger results from a *design defect*.” Godoy was contending that no matter how white-lead carbonate pigment could be designed, it is defective. The Court of Appeals disagreed.

The American Law Institute, which continually studies issues of law and formulates appropriate legal rules for use in jurisdictions of the United States who desire to adopt them, developed a products liability rule which states in part:

“A product:...(b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;...”

The Court held that under that legal rule, “there are two alternative routes to holding a raw materials supplier liable for damages caused by a product that uses the raw material and causes harm because the product is defective: (1) the component, itself, is defective; or (2) the component supplier ‘substantially participates in the integration of the component into the design of the product.’” Godoy did not assert that the defendants participated in the integration of the white-lead carbonate into paint, and Godoy’s lawyer told the circuit court that there was a use for white lead carbonate in plastics. Therefore, the Court of Appeals turned to the first requirement

to examine whether the component was by itself “defective” as that term was used in the above-stated rule of law. The Court held that the only possible definition of “defective” that could be applicable to Godoy’s case was subsection (b) which requires that “the foreseeable risk of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design.” The Court concluded that there was no alternative design to make the white-lead carbonate without using lead and therefore dismissed Godoy’s complaint. The court held: “The bottom line here, as recognized by the circuit court, is that one cannot make white-lead carbonate without using lead.”

Thus, according to the Wisconsin Court of Appeals, manufacturers who are makers of dangerous component products that may, when integrated into another product, result in a defectively dangerous product are not liable in strict liability for injury caused by the integrated product as long as they do not participate in the integration of the component into the design or manufacture of the integrated product. However, review of its decision is pending before the Wisconsin Supreme Court.